

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

ADNAN AWAD

PLAINTIFF

vs.

No. 1:93CV376-D-D

UNITED STATES OF AMERICA

DEFENDANT

OPINION

On December 17, 1993, Adnan Awad instituted this action against the United States of America, seeking damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2401(b) and 2671-2680, for false imprisonment, conspiracy, intentional infliction of emotional distress, bad faith breach of contract, invasion of privacy, negligence, trespass to chattels and conversion. The trial of this matter began on February 26, 2001, and was concluded on March 7, 2001.<sup>1</sup>

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the court issues the following findings of fact and conclusions of law.

*A. Factual Background*

In 1982, the Plaintiff Adnan Awad, while carrying a highly sophisticated explosive device, traveled from the Middle East to Geneva, Switzerland, in furtherance of a terrorist mission under the

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<sup>1</sup>Initially, the Plaintiff's wife, Lynn Awad, also asserted tort claims against the United States pursuant to the Federal Tort Claims Act. She subsequently conceded these claims.

In addition, both the Plaintiff and his wife, pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed. 2d 619 (1971), initially asserted federal constitutional claims against three individual federal government officers: FBI Special Agents C. Allen Maxwell and Edward J. Needham, and Deputy United States Marshall Dana Dickson. On March 1, 2001, at the conclusion of the Plaintiff's case-in-chief, the court granted these individual Defendants' motion for judgment as a matter of law, finding that they were entitled to qualified immunity. As such, all claims against the individual Defendants have been dismissed, and the only remaining claims in this lawsuit are the Plaintiff Adnan Awad's claims against the United States under the Federal Tort Claims Act.

guidance of the May 15 Organization, a radical Iraqi-based Palestinian terrorist group notorious for bombings across Europe and the Middle East. Once in Switzerland, Awad contacted the United States Ambassador at the American Embassy in Bern, and relayed information concerning the device. After helping authorities locate and disarm the device, which was located in a hotel room at the Geneva Hilton Hotel, Awad remained in Switzerland, where he was issued personal identity documents by the Swiss and/or Lebanese governments, including a passport that he subsequently used to travel outside Switzerland.

In late 1984, various United States government officials, including the United States Attorney for the District of Hawaii, Daniel Bent, and a Department of Justice attorney, Larry Lippe, approached Awad in Switzerland and persuaded him to travel to the United States to aid in the defense against international terrorism. Specifically, Awad's testimony was sought in connection with a planned prosecution of Mohammed Rashid, a top leader of the May 15 Organization, who had allegedly placed a bomb on board an August 11, 1982, Pan Am flight bound from Tokyo, Japan, to Honolulu, Hawaii. The bomb exploded twenty minutes before the flight was scheduled to land in Hawaii, killing one person and wounding fifteen others.

Awad came to this country in December of 1984 and enrolled in the United States Marshals Service Witness Security Program (WITSEC), after being promised by Bent and Lippe that he would be given United States citizenship and a passport.<sup>2</sup> Upon his enrollment in WITSEC, Awad was also required by the United States Marshals Service (USMS) to sign a Memorandum of Understanding,

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<sup>2</sup>Despite Bent and Lippe's promise, and the subsequent assistance of several government officials as well as private attorneys, Awad did not receive United States citizenship and a passport until June of 2000, over fifteen years after his arrival. And, even then, he appears to have received his citizenship and passport primarily as a result of his own persistent and extensive efforts. See Exh. D-13.

pursuant to which Awad placed his identification documents, including his Swiss/Lebanese passport, in safekeeping with the USMS. In return, the USMS agreed to return these documents to Awad should he desire to leave WITSEC and revert to his true identity.<sup>3</sup>

Awad remained in WITSEC until May of 1986, when he voluntarily left its protection after becoming dissatisfied with the strictures of the program. Later that same year, Awad testified before a federal grand jury in Washington, D.C. concerning Mohammed Rashid and the May 15 Organization's terrorist activities. On July 14, 1987, the grand jury indicted Rashid and others for their role in the 1982 Honolulu Pan Am airliner bombing.

In May of 1988, Mohammed Rashid was arrested in Athens, Greece, and the Greek authorities, in lieu of extraditing him to the United States, decided to prosecute Rashid in Greece for his role in the 1982 Honolulu Pan Am airliner bombing. About this same time, Awad, who was living in Boston, was contacted by United States government officials regarding the possibility of his providing testimony at Rashid's trial in Greece. Awad, who was having financial difficulties, agreed to reenter WITSEC for six months and provide testimony against Rashid. Shortly thereafter, he received various types of financial assistance from the government, including money for the payment of a house mortgage for six months. After six months passed, Awad agreed to continue to remain in WITSEC and to testify against Rashid, whose trial in Greece had been delayed. Thereafter, in October of 1990, Awad was deposed by Greek officials in Washington, D.C., concerning the Rashid trial. Subsequently, in February of 1991, Awad again voluntarily left WITSEC due to his

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<sup>3</sup>In fact, the Swiss/Lebanese passport was never returned to Awad, despite his voluntary termination from the WITSEC program in May of 1986. Instead, soon after Awad's arrival in this country, the USMS sent the passport to the Federal Bureau of Investigation, and it was returned to the Swiss government. See Exh. D-17.

dissatisfaction with the program's security requirements.

Although no longer in WITSEC, Awad traveled to Greece and testified against Rashid in June of 1991 and again in November of 1991. While en route to Greece and during the trial, Awad received protective services from the United States. Due in no small part to Awad's testimony, which this court finds was of vital importance to this nation, Rashid was convicted by the Greek court and sentenced to eighteen years imprisonment. Under Greek law, however, Rashid was entitled to a re-trial *de novo* by a Greek appellate court. This re-trial was held in Greece in the Spring of 1993. For this second trial, Awad again traveled from the United States to Greece and testified against Rashid, who was again convicted and sentenced to fifteen years imprisonment. In the second trial, Awad again furnished crucial testimony.

The Greeks, however, released Rashid from prison in December of 1996. He was then arrested in a third country by the FBI in June of 1998, and brought here to face charges stemming from the 1982 Honolulu Pan Am airliner bombing. He is currently in federal custody awaiting trial. See United States v. Rashed, 234 F.3d 1280 (D.C. Cir. 2000).

#### *B. Discussion*

The United States may only be sued to the extent that it has waived its sovereign immunity. United States v. Orleans, 425 U.S. 807, 814, 96 S.Ct. 1971, 1976, 48 L. Ed. 2d 390 (1976); McNeily v. United States, 6 F.3d 343, 347 (5<sup>th</sup> Cir. 1993). Congress has enacted two waivers of sovereign immunity potentially applicable to this dispute: the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-2680 (FTCA), and the Tucker Act, 28 U.S.C. §§ 1346(a), 1491.<sup>4</sup> These

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<sup>4</sup>The FTCA provides that district courts have jurisdiction against the United States for claims "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

waivers of sovereign immunity must be strictly construed in favor of the United States. Atorie Air, Inc. v. F.A.A., 942 F.2d 954, 958 (5<sup>th</sup> Cir. 1991).

The FTCA and the Tucker Act's respective waivers of sovereign immunity are non-overlapping. The FTCA only waives sovereign immunity for tort claims; sovereign immunity for claims founded upon express or implied contracts with the United States is waived by the Tucker Act, and not by the FTCA. Rothe Dev. Corp. v. United States Dep't of Def., 194 F.3d 622, 624 (5<sup>th</sup> Cir. 1999); Davis v. United States, 961 F.2d 53, 56 (5<sup>th</sup> Cir. 1991). In other words, plaintiffs bringing contract claims against the United States must do so within the confines of the Tucker Act, and Plaintiffs bringing tort claims against the United States must do so within the confines of the FTCA. See Atorie Air, 942 F.2d at 958 (holding that waivers of sovereign immunity must be strictly construed in favor of United States).

It has been held that Tucker Act jurisdiction exists to adjudicate claims that the Government has breached its agreements under the Witness Security Program. Doe v. Civiletti, 635 F.2d 88, 94-95 (2<sup>nd</sup> Cir. 1980). Further, it is the Tucker Act, and not the FTCA, that provides jurisdiction for claims of tortious breach of contract, even when the claim is set forth in the plaintiff's complaint as a tort claim for "bad faith." United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948); Jeppesen Sanderson, Inc. v. United States, 19 Cl. Ct. 233, 237 (Cl. Ct. 1990); Olin Jones Sand Co. v. United

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office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

The Tucker Act provides that the United States Court of Federal Claims and the federal district courts have concurrent jurisdiction for claims not exceeding \$10,000 that are founded upon, *inter alia*, any express or implied contract with the United States. The United States Court of Federal Claims has exclusive jurisdiction for such claims that exceed \$10,000. 28 U.S.C. §§ 1346(a), 1491.

States, 225 Ct.Cl. 741 (Ct. Cl. 1980). In determining whether a claim is based in tort or contract, the court is not bound by the parties' characterizations of the complaint. City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990). Instead, the court must examine the essence of the plaintiff's claims to determine whether or not the claims arise out of the failure to perform a contractual obligation. See City Nat'l Bank, 907 F.2d at 546 (claim for gross negligence under FTCA dismissed because it arose out of government's failure to act in accordance with loan participation agreement); Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357-58 (5<sup>th</sup> Cir. 1965) (affirming dismissal of negligence claim because it was founded on alleged failure to perform contractual obligation).

In addition, the United States Court of Appeals for the Fifth Circuit has consistently held that claims which are founded upon an alleged failure to perform contractual obligations are not tort claims that support subject matter jurisdiction under the FTCA; this is so even when the Plaintiff alleges claims for torts such as misrepresentation, conversion, negligence or bad faith breach of contract. Davis, 961 F.2d at 55-56; Blanchard, 341 F.2d at 357. In other words, if the Plaintiff's purported tort claims are in fact based on an alleged breach of contract, the claims are deemed to be based on a contract action and not a tort action; claims such as this fall outside the FTCA's waiver of sovereign immunity. Davis, 961 F.2d at 56; City Nat'l Bank, 907 F.2d at 546. Instead, the Tucker Act provides the appropriate waiver of sovereign immunity. See, e.g., United States v. Huff, 165 F.2d at 725. In short, where the plaintiff's claims require the court to construe the government's promises, and to determine if they were carried out, the Tucker Act, and not the FTCA, provides jurisdiction. Id.

As shown below, all of Awad's claims arise out of two separate agreements he made with the

United States government, both of which Awad alleges were contracts. The first agreement, evidently entered into before Awad left Switzerland for the United States, was between Awad and the United States Attorney for the District of Hawaii, Daniel Bent, and a Department of Justice Attorney, Larry Lippe. As part of this agreement, Awad agreed to come to the United States and assist the United States in its fight against international terrorism; in return, Bent and Lippe promised Awad that he would be given United States citizenship and a passport. See Exh. D-13, p. 3. The second agreement was between Awad and the United States Marshals Service. In the pertinent part of this agreement, which was entered into prior to Awad's placement into WITSEC, Awad agreed to place in safekeeping with the Marshals Service all identification documents revealing his true identity. In return, the Marshals Service agreed to retain the documents, and to return them to Awad should he ever desire to revert to his true identity. See Exh. D-17, p. 16.

As such, and as further explained below, all of Awad's claims, even those styled as tort claims, arise out of one or both of the purported contracts he had with the government. And, it is undisputed that the amount in controversy on Awad's claims is greater than \$10,000.00. This court, therefore, is without subject matter jurisdiction to adjudicate any of Awad's claims. Instead, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction over the claims. See 28 U.S.C. §§ 1346(a), 1491(a)(1).

#### 1. Bad Faith Breach of Contract

Actions for bad faith breach of contract, even when styled as a tort, first require proof of a breach of contract. American Mgmt. Corp. v. Dunlap, 784 F. Supp. 1245, 1249 (N.D. Miss. 1992); Eselin-Bullock & Assocs. Ins. Agency v. National Gen. Ins. Co., 604 So. 2d 236, 240 (Miss. 1992). And, as previously explained, the Fifth Circuit has held that such actions are not cognizable under the

FTCA; rather, it is the Tucker Act which waives sovereign immunity for such claims. Davis, 961 F.2d at 55-56; City Nat'l Bank, 907 F.2d at 546; Blanchard, 341 F.2d at 357; United States v. Huff, 165 F.2d at 725. As such, because the amount in controversy in this case is greater than \$10,000.00, this court is without jurisdiction; instead, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

## 2. False Imprisonment

The tort of false imprisonment has two elements:

- (1) detention of the Plaintiff; and
- (2) that such detention was unlawful.

Wallace v. Thornton, 672 So. 2d 724, 727 (Miss. 1996).

Awad's claim for false imprisonment turns solely on his alleged contractual relationship with the United States government. Assuming, *arguendo*, that Awad can establish that he was detained in this country, his detention, if any, was solely the result of the United States not fulfilling its purported contractual obligation to provide him with United States citizenship and a passport. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA. And, because the damages sought are in excess of \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

## 3. Conspiracy



In the civil context, a conspiracy is a combination of persons for the purpose of accomplishing an unlawful purpose or a lawful purpose unlawfully. Shaw v. Burchfield, 481 So. 2d 247, 255 (Miss. 1985).

Awad has evidently conceded and abandoned this claim. See Plaintiff's Proposed Findings of Fact and Conclusions of Law at 1. Even assuming, however, that Awad still wishes to pursue this claim, its resolution turns solely on Awad's purported contractual relationship with the United States government, and the government's alleged conspiracy to violate its contracts with Awad. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA. And, because the damages sought are in excess of \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

#### 4. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress requires proof of conduct on the Defendant's part that was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Stafford v. True Temper Sports, 123 F.3d 291, 296 (5<sup>th</sup> Cir. 1997); Brown v. Inter-City Fed. Bank for Sav., 738 So. 2d 262, 264-65 (Miss. App. 1999).

Awad asserts that the government's behavior, in connection with its breach of the purported contracts that existed between the parties, constituted the intentional infliction of emotional distress.

But the *sine qua non* of this claim is the existence of those alleged contracts. This claim, therefore, arises from and is inextricably intertwined with the government's supposed breach of those contracts. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA. And, because the damages sought are in excess of \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

#### 5. Invasion of Privacy

The tort of invasion of privacy is comprised of four distinct and separate sub-torts:

- (1) the intentional intrusion upon the solitude or seclusion of another;
- (2) the appropriation of another's identity for an unpermitted use;
- (3) the public disclosure of private facts; or
- (4) holding another to the public eye in a false light.

Plaxico v. Michael, 735 So. 2d 1036, 1039 (Miss. 1999).

In this case, it appears that only the first sub-tort may be in any way implicated. To recover under that sub-tort, Awad must show a substantial interference with his seclusion of a kind that would be highly offensive to the ordinary, reasonable man, as the result of conduct to which the reasonable man would strongly object. Plaxico, 735 So. 2d at 1039. Further, Awad must show some bad faith or utterly reckless prying in order to recover. Id.

Awad has evidently conceded and abandoned this claim. See Plaintiff's Proposed Findings

of Fact and Conclusions of Law at 1. Even assuming, however, that Awad still wishes to pursue this claim, its resolution turns solely on his purported contractual relationship with the United States government, and the government's alleged intentional intrusion upon his solitude or seclusion while violating its contract with him. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA. And, because the damages sought are in excess of \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

#### 6. Negligence

To establish a claim for negligence under Mississippi law, Awad must prove the following elements:

- (1) the existence of a duty on the part of the defendant to conform to a specific standard of conduct;
- (2) a breach of that duty;
- (3) that the breach of duty was the proximate cause of the plaintiff's injury; and
- (4) that damages to the plaintiff have resulted.

Dickey v. Baptist Mem'l Hosp., 146 F.3d 262, 265 (5<sup>th</sup> Cir. 1998); Barner v. Gorman, 605 So. 2d 805, 808-9 (Miss. 1992).

Any duty the government had to provide Awad with United States citizenship or a passport sprang initially from the agreement Awad allegedly made with Bent and Lippe. See Exh. D-13, p.3.

Likewise, any duty the government had to return Awad's Swiss/Lebanese passport sprang initially from the agreement Awad allegedly made with the United States Marshals Service. D-17, p. 16. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA, even though the claim is for negligence. And, because the damages sought are in excess of \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

#### 7. Trespass to Chattels

While there are no Mississippi cases specifically setting out the elements of the tort of trespass to chattels, the court finds that in order to prevail Awad must establish that there has been an unauthorized interference with his possession of personal property, or an unauthorized use of his personal property. Fordham v. Eason, 521 S.E.2d 701, 704 (N.C. 1999).

Awad has evidently conceded and abandoned this claim. See Plaintiff's Proposed Findings of Fact and Conclusions of Law at 1. Even assuming, however, that Awad still wishes to pursue this claim, its resolution turns solely on Awad's alleged contractual relationship with the United States government, and the government's alleged unauthorized interference with Awad's possession of personal property, or an unauthorized use of his personal property. Here, Awad is presumably alleging that the government interfered with his possession of his Swiss/Lebanese passport, which according to the alleged contract between the parties, the government was to return should Awad choose to leave the Witness Security Program and revert to his true identity. See Exh. D-17, p. 16.

This claim, therefore, arises from the purported contractual relationship between the parties. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA. And, because the damages sought are greater than \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

#### 8. Conversion

Under Mississippi law, a conversion occurs when a person exercises an unauthorized act of dominion or ownership over the personal property of another. General Motors Acceptance Corp. v. Bates, 954 F.2d 1081, 1086 (5<sup>th</sup> Cir. 1992); Rogers v. The Mississippi Bar, 731 So. 2d 1158, 1167 (Miss. 1999); Masonite Corp. v. Williamson, 404 So. 2d 565, 567 (Miss. 1981).

Awad has evidently conceded and abandoned this claim. See Plaintiff's Proposed Findings of Fact and Conclusions of Law at 1. Even assuming, however, that Awad still wishes to pursue this claim, its resolution turns solely on Awad's purported contractual relationship with the United States government, and the government's alleged unauthorized act of dominion or ownership over his personal property. Here, Awad is presumably alleging that the government exercised an unauthorized act of dominion or ownership over his Swiss/Lebanese passport, which according to the alleged contract between the parties, the government was to return should Awad choose to revert to his true identity. See Exh. D-17, p. 16. This claim, therefore, arises from the purported contractual

relationship between the parties. As such, pursuant to the previously cited Fifth Circuit cases of Davis v. United States, 961 F.2d 53, 55-56 (5<sup>th</sup> Cir. 1991), City Nat'l Bank v. United States, 907 F.2d 536, 546 (5<sup>th</sup> Cir. 1990), Blanchard v. St. Paul Fire and Marine Ins. Co., 341 F.2d 351, 357 (5<sup>th</sup> Cir. 1965), and United States v. Huff, 165 F.2d 720, 725 (5<sup>th</sup> Cir. 1948), Awad's claim is cognizable solely under the Tucker Act, not the FTCA. And, because the damages sought are in excess of \$10,000.00, the United States Court of Federal Claims possesses exclusive subject matter jurisdiction to adjudicate this claim. 28 U.S.C. §§ 1346(a)(2), 1491(a)(1).

*C. Transfer to the United States Court of Federal Claims*

A court's lack of subject matter jurisdiction may be raised by the parties at any time. Giles v. NYLCare Health Plans, Inc., 172 F.3d 332, 336 (5<sup>th</sup> Cir. 1999); Fed. R. Civ. P. 12(h)(3). Furthermore, the court is obligated to raise the issue *sua sponte* if it discovers that it lacks subject matter jurisdiction. Free v. Abbott Labs., Inc., 164 F.3d 270, 272 (5<sup>th</sup> Cir. 1999). And, if it appears that the court does in fact lack subject matter jurisdiction over the plaintiff's claims, the court shall dismiss or transfer the action. Fed. R. Civ. P. 12(h)(3); 28 U.S.C. § 1631. For the following reasons, the court finds that, in lieu of dismissal, transfer of this action to the United States Court of Federal Claims is proper.

28 U.S.C. § 1631, in pertinent part, provides:

Whenever a civil action is filed in a court ... and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action ... to any other court in which the action or appeal could have been brought at the time it was filed...

28 U.S.C. § 1631.

Rather than dismiss Awad's claims outright, the court finds, pursuant to 28 U.S.C. § 1631,

that it is in the interest of justice to transfer this action to the United States Court of Federal Claims. Awad filed this case in good faith in this district, and it is only now that the court, in light of evidence revealed at trial, finds that it does not possess subject matter jurisdiction to adjudicate these claims. Specifically, the court now has before it Exhibits D-13 and D-17, which make clear that all of Awad's purported FTCA claims arise in contract, so as to render the United States Court of Federal Claims his exclusive forum. As such, in the interest of justice, the court shall transfer, rather than dismiss, Awad's claims.

#### *D. Conclusion*

All of Awad's remaining claims arise out of one or both of the purported contracts he had with the United States. As such, the existence of these contracts is an essential element in every one of Awad's claims, and the liability of the United States depends upon the expectations of the parties under the purported contracts. In order to prevail on any of his claims, Awad must show an express or implied contract between himself and the government, and a breach of those contracts. Whether the government faces potential liability for its actions, therefore, depends upon the terms and conditions of those purported contracts.

Accordingly, the court finds that the claims advanced by Awad arise out of the alleged contractual relationship between the parties. And, because Awad's claims are for an amount in excess of \$10,000.00, the court concludes that jurisdiction over this controversy is vested exclusively in the United States Court of Federal Claims. 28 U.S.C. § 1346(a). In light of the unique circumstances surrounding this case, however, the court finds that, pursuant to 28 U.S.C. § 1631, it is in the interest of justice that this cause be transferred to the United States Court of Federal Claims, and not dismissed.

A separate judgment in accordance with this opinion shall issue this day.

This the \_\_\_\_ day of April 2001.

\_\_\_\_\_/s/\_\_\_\_\_  
Chief Judge



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

ADNAN AWAD

PLAINTIFF

vs.

No. 1:93CV376-D-D

UNITED STATES OF AMERICA

DEFENDANT

JUDGMENT

After a bench trial and pursuant to an opinion issued this day, the court rules that

- (1) pursuant to 28 U.S.C. §§ 1346(a) and 1491, exclusive subject matter jurisdiction over the Plaintiff's claims is vested in the United States Court of Federal Claims; this court, therefore, lacks subject matter jurisdiction to adjudicate this cause; and
- (2) pursuant to 28 U.S.C. § 1631, this case is hereby TRANSFERRED to the United States Court of Federal Claims for ultimate resolution.

SO ORDERED, this the \_\_\_\_ day of April 2001.

\_\_\_\_\_/s/\_\_\_\_\_  
Chief Judge